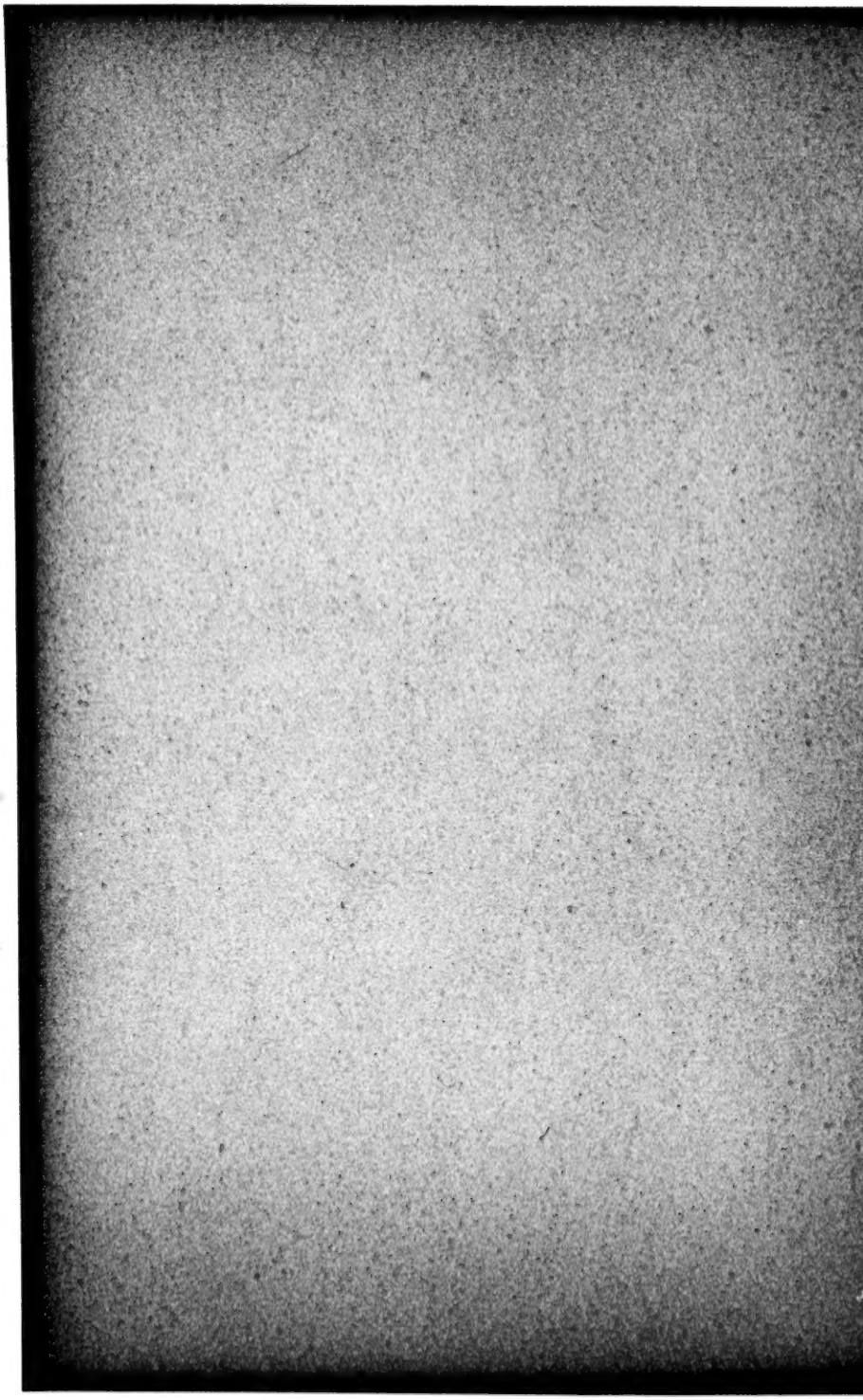

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1322

CAROLYN BRADLEY, *et al.*,

Petitioners,

vs.

THE SCHOOL BOARD OF THE CITY OF RICHMOND, *et al.*

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported at 472 F.2d 318 and is set out in the Appendix (160a-193a). The opinion of the District Court is reported at 53 F.R.D. 28, and is set out in the Appendix (113a-145a).

Other opinions of the District Court, not dealing with the question of attorneys fees, are reported at 317 F. Supp. 555, 325 F. Supp. 828, and 338 F. Supp. 67.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 29, 1972. On February 21, 1973, Mr. Chief Justice Burger ordered that the time for filing a Petition for Writ of Certiorari in this case be extended to March 29, 1971. The Petition was filed on March 29, 1971 and was granted on June 11, 1973. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Did the District Court have the discretion to award attorneys' fees to successful plaintiffs in this school desegregation action?

Statutory and Constitutional Provisions Involved

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983, 42 United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 718 of the Emergency School Aid Act of 1972, 86 Stat. 235, provides:

> Upon the entry of a final order by a court of the United States against a local educational agency, a

State (or any agency thereof) or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary Education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Statement of the Case

This case was commenced in 1961 to desegregate the public schools of Richmond. Jurisdiction was claimed, *inter alia*, under 28 U.S.C. §1343 to enforce 42 U.S.C. §1983, and under 28 U.S.C. §1331 to enforce the Fourteenth Amendment, the amount in controversy exceeding $10,000. Jurisdiction was conceded by the defendant school board.

In March, 1964, after extended litigation, the District Court approved a "freedom of choice" plan proposed by the defendant school board. Plaintiffs appealed to the Fourth Circuit Court of Appeals, which affirmed the lower court's finding that freedom of choice satisfied the school board's constitutional obligations. *Bradley* v. *School Board of Richmond, Virginia*, 345 F.2d 310 (1965). Plaintiffs then petitioned this Court for a Writ of Certiorari to consider the constitutionality of the freedom of choice plan. On November 15, 1965, this Court declined to review the Fourth Circuit's decision regarding freedom of choice, but did grant plaintiffs certain additional relief regarding discrimination in the assignment of teaching personnel. 382 U.S. 103.

Plaintiffs also sought attorneys' fees for this phase of the litigation. The District Court refused to award legal fees except for one $75.00 allowance, and the Fourth Circuit affirmed the denial. 345 F.2d at 321. For the litigation prior to this decision of the Fourth Circuit the school board had paid their outside counsel $6,580.00 (103a).

On March 30, 1966 the District Court approved a freedom of choice plan submitted by the parties. The plan expressly stated that freedom of choice would have to be modified if it did not produce significant results (20a-24a).

On May 27, 1968, this Court ruled that freedom of choice plans were not constitutionally permissible unless they actually brought about a unitary school system. *Green* v. *County School Board of New Kent County,* 391 U.S. 430.

On March 10, 1970, plaintiffs moved in the District Court for additional relief under *Green.* The defendant school board conceded that the freedom of choice plan under which it had been operating was unconstitutional. After considering a series of alternative and interim plans, the District Court on April 5, 1971, approved a plan for the integration of the Richmond schools involving pupil reassignments and transportation only within the city of Richmond. 325 F. Supp. 828. The defendant school board took no appeal from that decision.[1]

On August 17, 1970, the District Court directed the parties to attempt to reach agreement on the matter of attorneys' fees. When the parties were unable to reach such an agreement, memoranda and evidentiary material were submitted to the court. On May 26, 1971, the District Court awarded plaintiffs attorneys' fees of $43,355.00 as

[1] The defendant City Council of Richmond filed a notice of appeal from that decision on April 29, 1971, but on the motion of the City Council that appeal was dismissed on May 13, 1971.

well as costs and expenses of $13,064.65. On appeal the Fourth Circuit, Judge Winter dissenting, reversed the award of attorneys' fees.[2]

Summary of Argument

I. Section 718 of the Emergency School Aid Act of 1972 authorizes the award of counsel fees to a successful plaintiff in a school desegregation case. Such fees must be directed in the absence of special circumstances rendering such an award unjust. *Northcross* v. *Board of Education of Memphis City Schools,* 41 U.S.L.W. 3635 (1973). No such special circumstances are present in this case.

Section 718 should be applied to all cases pending on appeal as of the date it became effective, July 1, 1972. The general rule followed by this Court is that changes in the law are applied to all cases pending on appeal when the change occurs. *Thorpe* v. *Housing Authority of Durham,* 393 U.S. 268 (1969). The only exception to that rule is where the application of the new statute to events occurring before its enactment will result in manifest injustice. The award of counsel fees under section 718 in this case would in no way be unfair to the defendant school board. On the contrary, such an application of section 718 would carry out Congress's desire that school boards which violate the law pay the attorneys' fees of private citizens forced to sue to obtain their rights.

II. This Court has expressly sanctioned the award of attorneys' fees where a successful litigant wins relief which benefits others and where the award will serve to pass the

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[2] Although the school board's notice of appeal mentions the awards of both attorneys' fees and costs, only the matter of attorneys' fees was briefed, and the Fourth Circuit's decision does not deal with the costs.

cost of that litigation on to the other beneficiaries. *Hall* v. *Cole*, 36 L. Ed. 2d 702. Such an award of counsel fees is made, not to penalize the defendant, but to assure that those who desire benefits from the litigation are not unjustly enriched thereby.

The instant plaintiffs, by desegregating the schools of Richmond to the extent possible within the city, conferred a substantial benefit on all the students affected. Since the funds of the defendant school board are held for the use and benefit of those same students, an award of counsel fees against the school board serves to pass the cost of this litigation on to those other beneficiaries.

III. Plaintiffs maintained this action, not merely on their own behalf, but to vindicate important statutory and constitutional policies. The school integration achieved by the instant case benefits, not merely the students immediately affected, but the public at large. Such litigation also benefits the defendant school board, whose first interest and obligation is to comply with the Constitution. Where private litigants enforce important statutory or constitutional provisions and thus benefit the public, they are entitled to legal fees under the rationale of *Hall* v. *Cole*, just as they would be for a benefit conferred upon a smaller ascertainable group.

Courts of equity traditionally fashion new remedies to solve problems not adequately dealt with at law. The proliferation of important national policies enforceable only through private civil litigation is such a problem, for the cost of such litigation generally exceeds the benefit to any individual plaintiff. The award of counsel fees to make possible such litigation by private attorneys general carries out equity's policy of seeking to do complete justice in any case, and accords with provisions of 42 U.S.C. §1983,

broadly authorizing actions to "redress" deprivation of constitutional rights. Compare, *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968).

IV. Plaintiffs are entitled to counsel fees because of the defendant school board's conduct.

1. Prior to this latest round of litigation, the District Court in 1966 directed the establishment of a plan involving freedom of choice. In 1968 this Court declared such plans illegal where, as here, they did not in fact result in desegregation. *Green* v. *County School Board of New Kent County, Virginia,* 391 U.S. 430. Despite the illegality of Richmond's freedom of choice plan, and although the defendant school board must have been aware of *Green,* the board obstinately persisted in operating that unlawful plan for two years until brought back into court by plaintiffs. The District Court correctly found there was no justification for the board's decision to continue operating a system which they conceded was unconstitutional, and thus forcing plaintiffs to resort to private civil litigation. Under those circumstances the award of counsel fees was well within the District Court's discretion.

2. The award is also justified by the conduct of the board in proposing to the court two manifestly inadequate plans of desegregation in the spring and summer of 1970. The legal services for which fees were awarded to plaintiffs were rendered in opposing these two plans. The first plan, proposed in May 1970, would have left two-thirds of Richmond's schools overwhelmingly white or overwhelmingly black. The second plan, of July 1970, would have left a substantial number of overwhelmingly white or black high schools and middle schools, and placed about half the black students and half the white students in such segregated elementary schools. Both plans were clearly inade-

quate under the Fourth Circuit's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 431 F.2d 138 (1970). The District Court clearly had the discretion to award counsel fees to plaintiffs for legal services rendered in opposing these two plans.

ARGUMENT

I.

Section 718 of the Emergency School Aid Act of 1972 Requires the Award of Attorneys' Fees in This Case.

While this case was pending before the Court of Appeals, Congress enacted the Emergency School Aid Act of 1972.[3] Section 718 of that Act provides:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance,

[3] This development was brought to the court's attention, but the Fourth Circuit ruled that section 718 was not applicable to the instant case. In its opinion in the instant case the Court of Appeals held that there was no final judgment to which the award of fees could be connected (187a-188a). In a companion case, *Thompson* v. *School Board of Newport News,* 472 F.2d 177 (1972), the court held that section 718 only authorized legal fees for work done after the effective date of the statute, July 1, 1972.

> may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 718 is applicable to the instant case, and requires the award of attorneys' fees.

This Court has already held that, in cases falling under Section 718, the successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Northcross* v. *Board of Education of the Memphis City Schools,* 41 U.S.L.W. 3635 (1973); compare *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968). No such special circumstances are present in the instant case. The District Court expressly inquired whether there were special circumstances which might render an award unjust, citing the standard in *Newman,* and found there were not. 140a. The Court of Appeals noted that the award of attorneys' fees under the *Newman* standard were "either mandatory or practically so," 183a, but did not expressly decide whether the *Newman* standard had been met. The only circumstance in this case which the Court of Appeals felt militated against legal fees was its conclusion that, in view of the alleged uncertainty as to the constitutional requirements, the various defenses and plans put forward by the school board, though legally insufficient, were not advanced for purposes of delay or in bad faith. 177a. Such good faith, however, has been expressly held not to fall within the narrow category of special circumstances permitting the denial of attorney's fees in these cases. *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 401 (1968). There is of course no question that the instant action was necessary to bring about compliance. The school board was in violation of the District Court's 1966 decree and of the decisions of this Court, and made no pretense that it would change its ways other than under court order.

Section 718 further requires that legal fees may be awarded "upon the entry" of a final order against a defendant school board based on a violation of the Fourteenth Amendment or certain statutes. The quoted phrase does not require, of course, that the award of legal fees be simultaneous with the entry of such an order, but makes the existence of such a final order a prerequisite to the award of attorneys' fees. Several such orders had been entered and became final prior to the award of attorneys' fees in this case on May 26, 1971.[4] Where, as here, the course of litigation in a district court involves the entry of several orders over a period of months or years, neither section 718 nor sound judicial administration require that the question of legal fees be litigated separately and repetitiously upon the occasion of each such order. A request for fees may present difficult questions of fact or require the taking of evidence which might interfere with a court's simultaneous efforts to dismantle a dual school system. Costs, of which attorneys' fees are made a part by section 718, are normally imposed after the final disposition of the case. Doubtless a District Court has discretion to award costs and attorneys' fees incident to the disposition of interim relief matters, 6 Moore's Federal Practice ¶54.70[5], and it would be particularly desirable to exercise that discretion where, as is common in litigation under *Brown*, the fashioning of effective relief occurs over a period of years and delay in awarding fees and costs may work hardship on plaintiffs or their counsel. That discre-

[4] On June 20, 1970, the District Court ordered a suspension of all school construction in Richmond pending the approval of a final plan. On August 17, 1970, the District Court ordered into operation an interim plan for the 1970-71 school year. On April 5, 1971, the District Court ordered into operation the plan under which the Richmond schools are now operating. Each of these orders had become final when the attorneys' fees were awarded on May 26, 1970.

tion, however, exists for the protection of the plaintiff and his attorney; a defendant cannot be heard to complain if it is not so exercised.[5]

The defendant school board maintains, however, that section 718 should not be applied to the instant case because the legal services for which fees are sought were rendered prior to July 1, 1972, the date on which section 718 became effective.[6] Plaintiffs contend that section 718 should be applied to any case in which the propriety of an award of legal fees was still pending resolution on appeal as of July 1, 1972, regardless of when the services were performed. This case does not present the question of whether section 718 should be applied, retroactively, to cases in which the question of legal fees had been presented and been resolved by a final order prior to July 1, 1972.

Since *United States* v. *Schooner Peggy*, this Court has recognized that "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." 5 U.S. (1 Cranch) 103,

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[5] The Court of Appeals refused to apply section 718 to the instant case on the ground, *inter alia*, that on the effective date of the Act there was no final order regarding the substantive claim of discrimination pending on appeal (187a-188a). This standard, in the sense it was used, could never be met, for no order could be both final and also pending on appeal. If, as plaintiffs contend, section 718 should apply to services performed prior to July 1, 1972, there is no precedent for requiring that such fees be arbitrarily denied because of the date on which an order was entered directing the desegregation of a defendant school district.

[6] The date on which a law becomes effective is not the same thing as the date from which the law shall apply. The former date describes the time at which the courts will begin to invoke the law in dealing with events or transactions; the latter date delimits the class of events or transactions as to which that law may be invoked. For an example of a statute specifying both effective date and the transactions to which it applied, see section 104 of the Jury Selection Act of 1968, Pub.L. 90-274.

106 (1801). This Court has applied on appeal intervening changes in the law under a wide variety of circumstances. In *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268 (1969), after the plaintiff public housing authority had won an eviction order in state courts, the Department of Housing and Urban Development altered the procedural prerequisites to such evictions. This Court held that the defendant could not be evicted unless the new procedures were followed. "The general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision." 393 U.S. at 281. In *United States* v. *Alabama*, 362 U.S. 602 (1960), the district court dismissed an action brought by the United States under the 1957 Civil Rights Act against the state of Alabama on the ground that the State could not be sued under that statute. While the case was pending on appeal Congress passed the 1960 Civil Rights Act expressly authorizing suits against a state, and this Court applied the new statute. "Under familiar principles, the case must be decided on the basis of law now controlling, and the [new provisions] are applicable to this litigation." 362 U.S. at 604. In *Ziffrin* v. *United States*, after a company seeking permission to operate as a contract carrier had filed its application with the Interstate Commerce Commission, the Interstate Commerce Act was amended to bar such operation by an applicant who was controlled by a common carrier serving the same territory. This Court upheld the application of the new law to the pending request. "A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law. *A fortiori*, a change of law pending an administrative hearing must be followed in relation to permission for future acts." 318 U.S. 73, 78 (1943). See also *Vanderbark* v. *Owens-Illinois Glass Company*, 311 U.S. 538 (1941); *Carpenter* v. *Wabash Railway Co.*, 309 U.S. 23, 27 (1940), and cases cited; *American Steel Foundries* v.

Tri-City Cent. Trades Council, 257 U.S. 184, 201 (1921); *Reynolds* v. *United States*, 292 U.S. 443, 449 (1934).

Except where the statute involved expressly purports to be of exclusively prospective application, see e.g. *Goldstein* v. *California*, 41 U.S.L.W. 4829, 4830 (1973), this Court has routinely applied new laws to all cases pending on appeal, without reference to legislative history and without requiring express statutory language that they be so applied. When Congress has concluded that greater justice would be done if a new and different legal principle were applied to some recurring circumstances, Congress must be presumed to have intended that that new standard and the more equitable result entailed be applied to all cases, including those pending on appeal. Compare *Johnson* v. *United States*, 163 F.2d 30, 32 (1st Cir. 1908) (Holmes, J.).

A narrowly drawn exception to this practice has been sanctioned by this Court where, under the facts of a particular case, application of a new law to a matter arising before its enactment would work an unfair hardship on one of the parties. In such a situation this Court has, where possible, sought to construe the statute to avoid such an inequitable result. The precise category of cases to which this exception applies has never been clearly defined. In *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), this Court urged such a rule of construction "in mere private cases between individuals." 5 U.S. at 106. In *Union Pacific Railroad Co. v. Laramie Stock Yards Co.*, this Court explained the rule applied to statutes which might interfere with "antecedent rights," 231 U.S. 190, 199 (1913). *Cox* v. *Hart* defined a "retroactive" statute as one which impaired a vested right or imposed a new obligation on a private interest, and indicated that statutes should not readily be construed as "retroactive" in this

sense. 260 U.S. 427, 435 (1922). In *Claridge Apartments Co.* v. *Commissioner,* 323 U.S. 141 (1944), the Court deliberately construed a new tax law so as not to retroactively increase the taxes on "closed transactions." 323 U.S. at 164. In *Greene* v. *United States,* 376 U.S. 149 (1963), this Court refused to apply new and more strenuous administrative procedures for obtaining remuneration to a claimant who had already obtained a "final" and favorable determination under the old procedures. 376 U.S. at 161. Most recently, in *Thorpe* v. *Housing Authority of Durham,* this Court characterized *Greene* and its predecessors, more simply and more cogently, as exceptions "made to prevent manifest injustice." 393 U.S. at 282.[7]

The application of section 718 to the instant case would work no injustice such as that threatened in *Greene.* Section 718 did not alter the defendant school board's constitutional responsibility to provide an education free of the

[7] The difference between the rule reaffirmed in *Thorpe* and the exception applied in *Greene* is well illustrated by the facts in those cases. Both cases involved disputes between a private citizen and a government agency. In *Thorpe* a city public housing authority had sued to evict the defendant tenant; in *Greene* a private citizen who had been discharged when the Department of the Navy revoked his security clearance brought an action for lost wages. In both, while the litigation was still pending and before Mr. Greene had received reimbursement or Mrs. Thorpe been evicted, the procedures for reimbursement and eviction, respectively, were changed. However, in *Thorpe* the application of the new rule accrued to the benefit of the private citizen, whereas in *Greene* this Court refused to apply the change where the beneficiary would have been the government not the individual litigant. In *Greene* the application of the new rule would have interfered with a right to reimbursement which had been established and became final, 376 U.S. at 161; in *Thorpe* the Housing Authority had no comparable rights to infringe, 393 U.S. at 283. And, while in *Thorpe* the tenant had insisted throughout the litigation that she was entitled to procedural protections guaranteed by the new provision, in *Greene* the government had never questioned the procedures being followed until seven years after the litigation began, those procedures were altered by administrative regulations. Compare *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 418-419 (1971).

stigma of segregation, and plaintiffs do not seek to apply retrospectively any new standard of conduct first established in 1972. The school board's substantive obligations are those of the Constitution, as announced by this Court; section 718 only elaborates the remedy available to a private citizen when local officials have violated the law. As Senator Cook remarked during the debate on section 718:

> The 14th amendment to the Constitution of the United States was there long before we [Congress] came to a conclusion that something should be done in the field of discrimination in the school system of the United States. We are not talking about something that was born yesterday.[8]

The school board in the instant case does not claim it would have acted any differently between 1966 and 1972 had section 718 been in effect at that time. Under such circumstances, the application of section 718 to litigation occurring before its effective date can hardly be said to be unfair. The only relevant right which existed prior to the enactment of section 718 was the right of the instant plaintiffs to an education in a unitary school system; application of section 718 to this case serves not to impair that right but to vindicate it. Plaintiffs' assertion that they are entitled to attorneys' fees is not a new claim suddenly asserted in the light of section 718; such fees were asked in the original complaint filed in 1961,[9] and have repeatedly been sought in the proceedings since that time.

That legal fees should be awarded under section 718 for work done before its effective date is supported by the

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[8] 117 Cong. Rec. 11528.

[9] See 4a.

legislative history of the Emergency School Aid Act of 1972.[10]

Section 718 grew out of a provision contained in a bill sponsored by Senator Mondale in 1971. The statute proposed by Senator Mondale would have authorized the payment of counsel fees out of federal funds specially set aside for that purpose, $5 million for the first year and $10 million for the second. That proposal, included in the committee bill presented to the Senate, expressly stated that the award would be "for services rendered, and costs incurred, *after* the date of the enactment of this Act . . ."[11] (Emphasis added) On the floor of the Senate,

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[10] The predecessor to section 718 was first proposed by Senator Mondale. S. 683, 92nd Cong., 1st Sess., §11. It was reported out of committee as section 11 of S.1557. See Sen. Rep. No. 92-61, 92nd Cong., 1st Sess. On April 21, 1971, at the urging of Senators Dominick and Cook, section 11 was stricken from the proposed bill. 117 Cong. Rec. 11338-11345. The next day, on an amendment sponsored by Senator Cook, section 718 in its present form was inserted in the bill. 117 Cong. Rec. 11521-11529, 11724-26. The House amended the bill passed by the Senate, striking everything after the enacting clause and inserting a new text which, *inter alia*, deleted any mention of counsel fees. The provision for legal fees was restored in conference. Conference Rep. No. 798, 92nd Cong., 2nd Sess. (1972). The only debate on the subject of attorneys' fees occurred in the Senate on April 21 and 22, 1971.

[11] Section 11(a) of Senator Mondale's bill, S.683, 92nd Cong., 1st Sess., provided in full:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the Department of Health, Education, and Welfare for failure to comply with any provision of this Act, title I of the Elementary and Secondary Education Act of 1965 or discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or of the fourteenth article of amendment to the Constitution of the United States as they pertain to elementary and secondary education, such court shall award, from funds reserved pursuant to section 3(b)(1)(c), reasonable counsel fee, and costs not otherwise reimbursed, for services rendered, and

Senator Dominick, with the support of Senator Cook, successfully amended the bill to delete this proposed section in its entirety.[12] The next day, however, Senator Cook proposed to substitute new provisions authorizing the award of such attorneys' fees against the defendant.[13] This new provision *deleted* the language in Senator Mondale's version which had limited the section to services rendered after its enactment. This Court should not read back into section 718 the very limitation regarding application to services performed prior to enactment which was deliberately removed from the statute by Congress.

The application of section 718 to cases pending when it was enacted serves to carry out the purposes of that provision as expressed in the congressional hearings and debates leading to its enactment. Senator Mondale, who first urged a statutory authorization of legal fees in these cases, argued that his proposal and that of Senator Cook were needed to encourage more private litigation,[14] and to equalize the legal resources available to litigants in such cases.[15] If, however, such fees are only awarded for work done after July 1, 1972, and after the entry of a final order resulting from and subsequent to those services, substantial additional funds under this section for the increase of

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costs incurred, after the date of enactment of this Act to the party obtaining such order.

Similarly, the Committee Report states that the federal funds are available "for services rendered, and costs incurred, after the date of enactment of the Act." Sen. Rep. No. 92-61, 92nd Cong., 1st Sess., pp. 55-56 (1971).

[12] 117 Cong. Rec. 11345.

[13] 117 Cong. Rec. 11520-21.

[14] 114 Cong. Rec. 10760, 10761, 10762-3, 10764, 11339-40, 11343, 11344, 11345.

[15] Hearings Before the Subcommittee on Education of the Senate Labor and Public Welfare Committee, 92nd Cong., 1st Sess. 99 (1971); 114 Cong. Rec. 10762.

private litigation will not be available for years.[16] It is hardly likely that Senator Mondale envisioned or desired such a delay when he called for a statutory right to legal fees to meet the "urgent need" for vigorous private litigation to resolve the "major crisis in the enforcement of constitutional protections affecting civil rights in this land."[17]

Senator Cook, the draftsman and sole spokesman for section 718 as finally enacted, emphasized an additional reason for his amendment. Senator Cook opposed Senator Mondale's proposal on the ground that it failed to require that the school system which had violated the law pay the costs incurred in rectifying that violation. He urged:

> [W]e can solve the problem by merely inserting the language that the costs and attorneys' fees will be

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[16] The practical realities of school litigation are such that the goal sought by Senator Mondale will be substantially delayed if attorneys' fees are not awarded for services performed prior to the effective date of the statute. The vast majority of school desegregation cases have in the past been, and will continue to be, brought by a handful of private attorneys supported in many instances by national organizations concerned with such litigation. The costs and salaries of the attorneys must be paid by those organizations or sacrificed by those attorneys from the moment a case is begun, but such costs and fees are only available under section 718 after a final judgment has been entered in the case. The delay between the commencement of an action and the entry of any final judgment will often be substantial. In the cases decided *sub nom. Thompson* v. *School Board of the City of Newport News*, 472 F.2d 177 (1972), in which the Fourth Circuit refused to apply section 718 to work done before its effective date, the complaints initiating those actions had first been filed in 1961, 1965, 1969 and 1970. If section 718 is limited to work done after July 1, 1972, it will be years before that statute yields sufficient legal fees to enable private attorneys and their organizational sponsors to increase the number of school desegregation cases they are financially able to handle. On the other hand, if such fees are made available now in appropriate pending cases for work done before July 1, 1972, the resources will be available at once to make possible the increase in such litigation sought by Congress.

[17] 117 Cong. Rec. 10760, 10762. See also 117 Cong. Rec. 11339, 11342, 11343, 11344.

> charged against the losing litigant. . . . We can even charge those expenses and make them a debt against the Title I funds, so that we are penalizing the person who violates the law; we are penalizing the person who decides the 14th amendment is for someone else and not for him. We are then *imposing the cost on that individual who saw fit to commit an act that the court concluded was in violation of the law*, or in violation of the proper utilization of Title I funds and that, as an indirect result thereof, that person shall suffer.[18]

In the debates on his own amendment, Senator Cook reiterated his desire to place the cost of litigation on the "guilty party",[19] to assure that a school board violating the law will "pay for it",[20] and to provide that those who have disobeyed the constitution "should have to make recompense for that mistake." [21] Senator Cook also referred, as had Senator Mondale,[22] to the inequity of paying with education funds for the lawyers who unsuccessfully opposed integration, but not using those funds for attorneys who achieved an end to segregation.[23]

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[18] 117 Cong. Rec. 11343 (Emphasis added). See also 117 Cong. Rec. 11341, 11342.

[19] 117 Cong. Rec. 11725.

[20] 117 Cong. Rec. 11527.

[21] 117 Cong. Rec. 11528.

[22] Hearings Before the Subcommittee on Education of the Senate Labor and Public Welfare Committee, 92nd Cong., 1st Sess. 99 (1971) "Now, most of the money today being spent publicly in school desegregation cases is public money which is being spent for lawyers and legal fees to resist the reach of the 14th amendment. So why would it not be fair to set aside a modest amount to pay lawyers who are successful in enforcing the Constitution for legal fees and costs."

[23] 117 Cong. Rec. 11527, 11528.

It is reasonable to assume that Congress contemplated that the injustices discerned by Senator Cook would be righted in cases still pending when section 718 became effective. It cannot plausibly be maintained that Senator Cook intended that, months or years after the enactment of section 718, school boards which had violated the law would be able to avoid recompensing those who corrected their mistakes merely because the plaintiffs' attorneys were diligent enough to bring that violation to an end prior to July 1, 1972.[24] The statute involved here is not one intended merely to shape future events by encouraging the initiation of litigation under the Fourteenth Amendment, compare *Linkletter* v. *Walker*, 381 U.S. 618 (1965), but was designed to effectuate Congress' judgment that a serious injustice is worked when, in a case such as this, the offending school board pays no price for its years of ignoring *Brown*, while the private plaintiff must look to himself and the generosity of his counsel or the public to meet the costs of enforcing the constitution. Compare *Jackson* v. *Denno*, 378 U.S. 368 (1964). In deciding who shall ultimately bear the cost of litigation to end discrimination in the public schools, this

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[24] Both Senator Mondale and Senator Cook explained that their goal was to provide the same right to attorneys' fees in school discrimination cases as exist for discrimination in housing, 42 U.S.C. §3612(c), in employment, 42 U.S.C. §2000e-5(A), and public accommodations, 42 U.S.C. §2000a-e(b). 117 Cong. Rec. 11339. (Remarks of Senator Mondale), 11521 (Remarks of Senator Cook) See *Northcross* v. *Board of Education of the Memphis City Schools*, 41 U.S.L.W. 3635 (1973). In the absence of special circumstances, a successful plaintiff in a housing, employment or public accommodations case would be entitled to attorneys' fees for all the legal services performed in connection with a case won on April 5, 1972 (the day final relief was awarded here) or July 1, 1972 (the day section 718 became effective). Because the substantive rights and counsel fee provisions were created by the same statute, sections 2000a-3(b), 2000e-5(k) and 3612(c), 42 U.S.C., apply to all actions described therein, regardless of when commenced. Congress presumably intended to create a similarly broad right covering all work done in all school cases.

Court should give full effect to the standards and values established by Congress in section 718 in all cases in which the question of attorneys' fees has not been finally resolved before July 1, 1972.

II.

Attorneys' Fees Must Be Awarded Because This Litigation Benefited Others.

In the absence of an express statutory requirement of attorneys' fees, federal courts in the exercise of their equitable powers may award such fees where the interests of justice so require. Their authority to do so derives from Article III[25] of the Constitution and, in cases such as this, section 1983, 42 U.S.C.[26] As Justice Frankfurter noted a generation ago, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation." *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 166 (1939). Federal courts do not hesitate to exercise this inherent equitable power wherever "overriding considerations indicate the need for such a recovery." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970).

One well-established case in which such fees are awarded is where a plaintiff's successful litigation confers "a substantial benefit on the members of an ascertainable class," and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them. *Mills* v.

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[25] "Section 2. Jurisdiction. The judicial power shall extend to all Cases, in law and *Equity*, arising under this Constitution, the Laws of the United States, and Treaties made . . ." (Emphasis added.)

[26] Section 1983 authorizes "an action at law, suit in *equity*, or other proper proceeding for redress." (Emphasis added.)

Electric Auto-Lite, 396 U.S. at 393-94. This rule has its origins in the "common-fund" cases, which have traditionally awarded attorneys' fees to the successful plaintiff when his representative action creates or traces a "common-fund," the economic benefit of which is shared by all members of the class. See, e.g. *Central Railroad and Banking Co.* v. *Pettus*, 113 U.S. 116 (1885); *Trustees* v. *Greenough*, 105 U.S. 527 (1883). In *Sprague* v. *Ticonic National Bank*, the rationale of these cases was extended to authorize an award of attorneys' fees to a successful plaintiff who, although suing on her own behalf rather than as a representative of a class, nevertheless established the right of others to recover out of specific assets of the same defendant through the operation of *stare decisis*. In reaching this result, the Court explained that the beneficiaries of the plaintiff's litigation could be made to contribute to the costs of the suit by an order reimbursing the plaintiff out of the defendant's assets from which the beneficiaries would eventually recover. Finally, in *Mills* v. *Electric Auto-Lite Co.*, this Court held that the rationale of these cases must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation "which corrects or prevents an abuse which would be prejudiced to the rights and interests" of those others. 396 U.S. at 396.[27]

Fee-shifting is justified in these cases because "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. at 392; see also *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 719 (1967); *Trustees* v. *Greenough*, 105 U.S. 527, 532 (1882). Thus, in *Mills* this Court ap-

[27] Also supporting the award in *Mills* was the fact that the action vindicated important statutory policies. 396 U.S. at 396.

proved an award of attorneys' fees to successful shareholder plaintiffs in a suit brought to set aside a corporate merger accomplished through the use of a misleading proxy statement in violation of §14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78(a). In reaching this result, this Court reasoned that, since the dissemination of misleading proxy solicitations jeopardized important interests of both the corporation and "the stockholders as a group," the successful enforcement of the statutory policy necessarily "rendered a substantial service to the corporation and its shareholders." 396 U.S. at 396. In *Hall* v. *Cole*, 36 L. Ed. 2d 702 (1973), legal fees were approved for a union member who successfully sued for reinstatement in his union after he had been expelled for criticizing the union's officers. This Court concluded that the plaintiff, by vindicating his own right, had dispelled the "chill" cast upon the right of others, and contributed to the preservation of union democracy. 36 L. Ed. 2d at 709. Both *Mills* and *Hall* involved a benefit that was not pecuniary in nature.[28]

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[28] In *Mills* this Court expressly repudiated any requirement that the benefit be pecuniary.

> The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a 'common fund' for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into court as a prerequisite to the court's power to order reimbursement of expenses. . . . [A]n increasing number of lower courts have acknowledged that a corporation may receive a 'substantial benefit' from a derivative suit, *regardless of whether the benefit is pecuniary in nature*. . . . [I]t may be impossible to assign monetary value to the benefit. Nevertheless . . . petitioners have rendered a substantial service to the corporation and its shareholders. 396 U.S. at 392, 395-396. (Emphasis added.)

Following *Mills*, legal fees have been awarded in cases involving such non-pecuniary benefits as guaranteeing free and fair union

Such legal fees are assessed against the defendant, not because of any bad faith, but because the costs will thus be passed onto and borne by the benefiting class. In the early common-fund cases, the fee was deducted directly from a sum of money held for distribution to the beneficiaries. *Trustees* v. *Greenough*, 105 U.S. 527 (1882). In *Mills* v. *Electric Auto-Lite Co.*, the beneficiaries of the action were a corporation and its stockholders; by awarding attorneys fees against the corporation the Court simultaneously assessed one of the beneficiaries and assured that the cost would be borne by the stockholders as owners of the corporation. 396 U.S. 375, 390. In *Hall* the fees were paid out of the treasury of the union involved, the contents of which were held for use by the union on behalf of its members, the beneficiaries of the action involved. 36 L. Ed. 2d at 709.

The instant case is clearly governed by *Mills* and *Hall*. Plaintiffs, in dismantling the dual school system within the city of Richmond benefited many persons other than themselves.[29] This case is a class action on behalf of all

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elections, *Yablonski* v. *United Mine Workers of America*, 466 F.2d 424 (D.C. Cir. 1972), cert. denied 41 U.S.L.W. 3624 (1973), discrimination in public housing, *Hammond* v. *Housing Authority*, 328 F. Supp. 586 (D. Ore. 1971), and inadequate medical facilities for prisoners. *Newman* v. *State of Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972). See also *Callahan* v. *Wallace*, 422 F.2d 59 (5th Cir. 1972); *Jinks* v. *Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972); *Sincock* v. *Obara*, 320 F. Supp. 1098 (D. Del. 1970). Legal fees have also been awarded to plaintiffs who simultaneously effectuated public policies and benefited others where the benefits involved such non-pecuniary matters as legislative reapportionment, *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972) and ending jury discrimination, *Ford* v. *White* (S.D. Miss., Civil Action No. 1230(N), opinion dated August 4, 1972.)

[29] The plaintiffs were able to achieve only such integregation as was possible within the city itself. A complete dismantling of the dual system involved would have required merger with the surrounding predominantly white counties. See *Bradley* v. *State Board of Education*, No. 72-550 and *School Board of the City of Richmond, Virginia* v. *State Board of Education*, No. 72-549.

the school children of Virginia and their parents or guardians (4a). The harm suffered by black children when compelled to attend segregated schools is well recognized. *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954);[30] Coleman, et al., Equality of Educational Opportunity (1966); U.S. Civil Rights Commission, Racial Isolation in the Public Schools, 106 (1967).[31] Nor can the maintenance of a dual school system be said to have benefited the white students involved.[32] Compare *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972).

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[30] "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

[31] "School personnel in predominantly white schools more often feel that their students have the potential and the desire for high attainment. The *Equality of Education Opportunity* survey found that white students are more likely to have teachers with high morale, who want to remain in their present school, and who regard their students as capable.

"The environment of schools with a substantial majority of Negro students, then, offers serious obstacles to learning. The schools are stigmatized as inferior in the community. The students often doubt their own worth, and their teachers frequently corroborate these doubts. The academic performance of their classmates is usually characterized by continuing difficulty. The children often have doubts about their chances of succeeding in a predominantly white society, and they typically are in school with other students who have similar doubts. They are in schools which, by virtue both of their racial and social class composition, are isolated from models of success in school."

[32] For white children, as for black, a vital part of their education consists in learning, through contact with their fellows, about the society in which they live and shaping through such contact the values which will guide them for years to come. Racial isolation cuts off these students from others with widely divergent views

Viewed in this context, there can be no doubt that plaintiffs, to the extent that they succeeded in dismantling the dual school system in Richmond, rendered a substantial service to the public school students of Richmond. Requiring reimbursement of plaintiffs' attorneys' fees out of the funds[33] of the school board "simply shifts the costs of litigation 'to the class that has benefited from them and would have had to pay them had it brought the suit.'" *Hall* v. *Cole*, 36 L. Ed. 2d at 709.

Although such fee shifting is within the inherent authority of equity, Congress has the power to circumscribe such relief. In *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967), for example, this Court held that the Lanham Act precluded an award of attorneys' fees in a trademark infringement case because the statute "meticulously detailed the remedies available" and Congress must have intended these express remedial provisions "to mark the boundaries of the power to award monetary relief in

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and experiences, and may inculcate fears and prejudices overcome only with great effort later in life. Students who may pursue business careers in the areas where they were educated will be deprived of contacts and acquaintances of commercial importance. Nor is it inconceivable that, among a new generation of Americans free of racial bigotry, an education in an all white school, particularly in the South, will carry a social stigma inconceivable to earlier generations.

[33] Those funds are held for use on behalf of the public school students who benefited from this action. Section 22-97(12) of the Code of Virginia authorizes the use of such funds: "to provide for the pay of teachers and of the clerk of the board, for the cost of providing schoolhouses and the appurtenances thereto and the repairs thereof, for school furniture and appliances, for necessary textbooks for children attending the public free schools whose parent or guardian is financially unable to furnish them; and for any other expenses attending the administration of the public free school system, so far as the same is under the control or at the charge of the school officers."

S. at 719, 721.[34] Unlike
cases arising under the Act," 386 U.s no specific authoriza-
the Lanham Act, section 1983 contai broadly authorizes the
tion of detailed remedies; rather, it y be appropriate.[35] A
courts to grant whatever relief ma n at law, suit in equity,
defendant is made liable "in an acti edress." Section 1983
or other proper proceeding for r of proceedings which
recites, not remedies, but the type ntent of Congress was
may be maintained, and the clear e of actions which be
not to set any boundary on the ty ntrary that *any* appro-
maintained, but to provide on the co l. The enactment, some
priate proceeding may be commence e IV of the 1964 Civil
93 years after section 1983, of Tit ansive grant of author-
Rights Act in no way limits the exp the inherent equitable
ity in section 1983 or circumscribes ion. Title IV does not
power left unimpaired by that sec ew legal remedies, and
confer upon private parties any n herein shall "affect ad-
expressly provides that nothing t sue for or obtain relief
versely the right of any person to n in public education."
in any court against discriminatio
42 U.S.C. §2000c-8.[36]

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[34] The statute in *Fleischmann* exp essly detailed six specific
remedies, including award of the plainti 's damage, the defendant's
profits, the costs of the action, additi onal damages up to three
times the amount actually sustained, a y amount over and above
the defendant's profits if that recov y proved inadequate, 15
U.S.C. §1117, as well as injunctive relie f. 15 U.S.C. §1116.

[35] See *Ross* v. *Goshi*, 35 F. Supp. 949, 955 n.15 (D. Hawaii 1972) ("Section 1983, on the other hand, is not a statute providing detailed remedies, and there is no reason to infer any congressional intent to limit the otherwise broad equitable powers of this court.") *NAACP* v. *Allen*, 340 F. Supp. 703, 709-710, n.9 (M.D. Ala. 1972); *Sims* v. *Amos*, 340 F. Supp. 691, 695 (M.D. Ala. 1972). See also *Lee* v. *Southern Home Sites*, 444 F.2d 143, 145 (5th Cir. 1971) (§1982).

[36] The decision of the Court of Appeals suggests that Congress may have intended to revoke this Court's inherent power to grant attorney's fees when, in the 1964 Civil Rights Act, it dealt with school segregation in Title IV without authorizing legal fees, whereas such fees were provided for in Titles II and VII. Section 2000c-

III.

Plaintiffs Are Entitled to Attorneys' Fees Because They Maintained This Action as Private Attorneys General.

A substantial number of lower courts have concluded that successful plaintiffs should be awarded attorneys' fees where they sue, not merely on their own behalf, but to enforce important constitutional or statutory policies.[37] Replying on both the reasoning and standard set in this Court's opinion in *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968), these decisions have concluded that legal fees should be awarded to such private attorneys general unless there are special circumstances which would render an award unjust. The District Court in the instant case relied on this ground as an alternative basis for its award of fees (135a-141a). This Court, however, has not indicated whether plaintiffs can recover fees as private attorneys general in the absence of an express authorization such as that present in *Newman*.[38] Plaintiffs maintain

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8 forbids any such conclusion however. If the existence of any part of Title IV is not to adversely affect the right to counsel fees, *ipso facto* the existence of Title IV itself cannot do so.

[37] *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Cooper* v. *Allen*, 467 F.2d 836 (5th Cir. 1972); *Knight* v. *Auciello*, 453 F.2d 852 (1st Cir. 1972); *Ross* v. *Goshi*, 351 F.Supp. 949 (D. Hawaii 1972); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972); *Ford* v. *White* (S.D. Miss., Civil Action No. 1230(N), opinion dated August 4, 1972); *Jinks* v. *Mays*, 350 F.Supp. 1037 (N.D. Ga. 1972); *Wyatt* v. *Stickney*, 344 F.Supp. 387 (M.D. Ala. 1972); *NAACP* v. *Allen*, 340 F.Supp. 703 (M.D. Ala. 1972); *Sims* v. *Amos*, 340 F.Supp. 691 (M.D. Ala. 1971).

[38] This Court expressly declined to reach that question in *Hall* v. *Cole*, 36 L. Ed. 2d 702, 708 n.7 (1973), and *Northcross* v. *Board of Education of the Memphis City Schools*, 41 U.S.L.W. 3635 n.2 (1973).

that such awards are proper, and would urge this Court to resolve this question of growing importance for the guidance of the lower courts.

The well established common benefit cases, discussed *supra*, sanction the award of attorneys' fees where a plaintiff's action confers a substantial benefit on the members of an ascertainable class, such as the members of a union or the shareholders of a corporation. *Hall* v. *Cole*, 36 L. Ed. 2d 702, 709 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 393-394 (1970). The rationale of those cases is equally applicable where, as here, the plaintiffs' action enforces important constitutional and statutory policies and thus benefits the public at large. Compare *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. at 396.[39] As this Court indicated in *Newman*, any action which vindicates such policies serves, *ipso facto*, to "advance the public interest." 390 U.S. 400, 402.

The plaintiffs in this action sued to vindicate the right of all students to attend not black schools or white schools, but just schools, a national policy of the highest importance. Compare, *Brown* v. *Board of Education*, 397 U.S. 483, 493 (1954). This national policy has been embraced and advanced in major legislation. *Northcross* v. *Board of Education of the Memphis City Schools*, 41 U.S.L.W. 3635 (1973).[40] The achievement of this goal of integration of

[39] "[I]n vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders."

[40] Congress has expressly authorized the Attorney General to institute civil actions under appropriate circumstances to "further orderly achievement of desegregation in public education." 42 U.S.C. § 2000c-6. The use of force or threats of force to prevent any person from enrolling in or attending any public school because of his race has been made a federal crime. 18 U.S.C. § 245 (b)(2)(A). All federal agencies providing financial assistance to state schools have been directed by Congress to insure, by termination of funding or otherwise, that no person is excluded from

the public schools is vital to the public interest. It develops for the benefit of all the creative talents of students who might otherwise be relegated to an inferior education, it contributes to the skills, motivation and earning power of young men and women who might otherwise be destined for the burgeoning ghettos that blight our major cities, and it inculcates in students, teachers, parents and others in the community racial attitudes essential to the creation of a society in which blacks and whites work and live together in peace.

The plaintiffs who bring litigation of such national import should not be required to bear alone the cost of the ensuing public benefit. This Court has abandoned any suggestion that a private party lacks standing to sue where his interest is essentially the same as all his fellow citizens, *Flast* v. *Cohen*, 392 U.S. 83 (1968); a plaintiff should not be denied reimbursement for benefits conferred on others merely because the beneficiary is not a small and distinct group, but the public at large. In the instant case the funds of the defendant school board derive from taxes paid by residents of the area most immediately affected by this action.[41] Assessing the cost of this action against such public revenues serves to pass on that cost to those who profited from it. *Hall* v. *Cole*, 36 L. Ed. 2d 702, 709 (1973).

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participation in any such program on account of race. 42 U.S.C. § 2000d-1. On repeated occasions Congress has authorized grants and technical assistance to assist school boards in ending segregation. 42 U.S.C. §§ 2000c-2 *et seq;* Elementary and Secondary Education Act of 1966, P.L. 89-750, §181; Emergency School Aid Act of 1972, P.L. 92-318, Title VII.

[41] A somewhat different situation would be presented where the defendant was a private person or organization, hence a beneficiary of the action but not necessarily able to pass on the cost of legal fees to all the other beneficiaries. This would be a circumstance relevant to, though not by itself controlling, the district court's decision as to whether special circumstances were present which rendered an award of counsel fees unjust. See p. 34, *infra*.

The award of legal fees was appropriate in *Mills* and *Hall*, not only because the litigation benefited the stockholders and union members involved, but because it benefited the corporation and union as well. See 396 U.S. 375, 396. That is not to say that the officials of the union or corporation supported the litigation or welcomed its results; the contrary was of course the case. Rather, Congress had defined the interests of corporations and unions by law in the Securities Exchange Act and the Labor-Management Reporting and Disclosure Act, respectively. In the instant case the school board is entirely a creature of the law; its only interest is in achieving the goals set by law in the manner also fixed by law. The particular desires of those who may sit on the board at any point in time, to the extent they are inconsistent with these goals and purposes, do not correspond to the legally cognizable interests of the board. Under the Constitution, the establishment of a unitary school system is as vital to the interests of the board as hiring instructors, teaching arithmetic, or providing students with books. An individual plaintiff who helps achieve any of these public goals through litigation is entitled to have his attorneys' fees paid by the defendant school board.

The power of the courts to award legal fees to a private attorney general conferring such a benefit on the public or the government derives, as in all common benefit cases, from the inherent equity power of the courts. See p. 21, *supra*. In the instant case the existence of that power is amply confirmed by the statutes under which this action is brought. The remedy authorized, 42 U.S.C. §1983; 28 U.S.C. §1343(3), is not simply damages or an injunction, but "redress" of deprivations of basic rights. This language constitutes the broadest possible authorization to the courts to fashion a just and effective remedy. It was to provide just such broad relief, in the face of inadequate state reme-

dies, that section 1983 was first enacted. *Monroe* v. *Pape*, 365 U.S. 167, 178 (1961). The term "redress" contemplates that the aggrieved plaintiff will be restored to the situation which would have obtained had his rights not been denied; such complete restoration ought include, in an appropriate case, compensation for the cost of attorneys' fees incurred that action for redress.

Courts of equity, in fashioning remedies to do complete justice, have traditionally created novel devices where the relief available at law proved inadequate for a new or unforeseen problem. When the general American rule against legal fees was first adopted, see *Arcambel* v. *Wisemam*, 3 U.S. (3 Dal.) 306 (1796), there were few if any federal statutes providing for the public weal which were susceptible of enforcement by private civil litigation, and in a country of only four million the resources of the federal government were adequate to the task of enforcing the few such laws which might exist. Since the turn of the century, however, the number of federal laws regulating private and government action for the good of the public has grown in an unprecedented fashion. Many of these laws are capable of private civil enforcement and, in a population of over two hundred million, not a few such laws can only be enforced by such private action. Similarly the decisions of this Court carrying out the provisions of the Constitution have spelled out many rights not readily capable of government enforcement, frequently because they are limitations on the powers of government itself.

In fashioning a remedy to deal with this problem, a court of equity could properly take cognizance of the injustice of using tax revenues only to defend government illegality, not to compensate those who prevent it. While the importance and cost of private civil actions to vindicate these public policies is often great, the financial gain to an indi-

vidual plaintiff is often *de minimis*. As the district court correctly observed:

> . . . this sort of case is an enterprise on which any private individual should shudder to embark. No substantial damage award is ever likely, and yet the costs of proving a case for injunctive relief are high. To secure counsel willing to undertake the job of trial, including the substantial duty of representing an entire class (something which must give pause to all attorneys, sensitive as is the profession to its ethical responsibilities) necessarily means that someone—plaintiff or lawyer—must make a great sacrifice unless equity intervenes. Coupled with the cost of proof is the likely personal and professional cost to counsel who work to vindicate minority rights in an atmosphere of resistance or outright hostility to their efforts. See *NAACP* v. *Button*, 371 U.S. 415, 435-36 (1963); *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968).

It is especially appropriate that the remedy devised be the award of counsel fees employed by recent statutory provisions protecting civil liberties, for such statutes should be treated "as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning. . . ." Stone, "The Common Law in the United States," 50 Harv. L. Rev. 4, 13-14 (1936); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143, 146 (5th Cir. 1971). The effective administration of justice in cases of this sort requires that the parties compete on a relatively comparable basis, lest the vast revenues of a public defendant be used to wear down without hope of reimbursement a private plaintiff of far more modest resources. It is well within the supervisory power of the courts to take steps necessary to put the parties on a more equal footing. Compare *Cheff* v. *Schrackenberg*, 384 U.S. 373, 380 (1966). The inherent power of the courts to enforce this Court's decisions in

Brown and *Greene* would mean little if the courts lacked the authority to enable private parties to bring violations of those decisions to their attention.

The authority of the courts to award legal fees to private attorneys general is of limited applicability, and does not entail a general abandonment of the well established American rule against awarding legal fees in civil cases. This authority does not extend to merely private disputes, but may be exercised only where the litigation benefits the general public or otherwise involves statutory or constitutional policy of unusual importance. It may be circumscribed by Congress, either expressly or by providing such detailed other remedies for violations of the right involved as to indicate a desire to preclude remedies not so enumerated. Compare *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967). Even where, as here, this authority exists, it should not be exercised if there are special circumstances rendering an award of counsel fees unjust. Compare *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968).

In the instant case, however, no such special circumstances were present. It was therefore within the District Court's discretion to award plaintiffs counsel fees for having vindicated, as private attorneys general, the Fourteenth Amendment and the decisions of this Court.

IV.

The District Court Had the Discretion to Award Attorneys' Fees Because of the Conduct of the Defendant School Board.

The District Courts have inherent authority to award legal fees to a prevailing party because of the conduct of the opposing party. See *Newman* v. *Piggie Park Enter-*

prises, 390 U.S. 400, 402, n. 4. This discretion is properly exercised where the bringing of the action was compelled by the defendant's inexcusable defiance of the law, or by unreasonable conduct by the defendant in the course of the litigation once commenced. In the instant case the District Court expressly grounded its award of attorneys' fees on the conduct of the defendant school board, both before plaintiffs' motion for further relief, 133a-135a, and thereafter, 135a-137a. The decision of the District Court in exercising that discretion carries with it a strong presumption of correctness, and should only be overturned on appeal upon a clear showing that that discretion was abused. *Newton* v. *Consolidated Gas Co.*, 265 U.S. 78, 83 (1924). The award of legal fees in the instant case was well within the discretion of the District Court.

1. *Conduct Prior to the Motion for Further Relief.*

When plaintiffs moved on March 10, 1972, for further relief in this case, the defendant school board had for several years been operating the Richmond public schools in a manner plainly inconsistent with the decision of this Court. All the legal fees awarded by the District Court are directly attributable to this unlawful practice; had the school board acted on its own to comply with the clear command of this Court, no such fees would have been incurred by the instant plaintiffs. An award of attorneys' fees is required where "the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy or persistent defiance of the law." *Brewer* v. *School Board of the City of Norfolk, Virginia*, 456 F.2d 943, 949 (4th Cir. 1972).[42]

[42] See also, *McEnteggart* v. *Cataldo*, 451 F.2d 1109 (1st Cir. 1971); *Horton* v. *Lawrence County Board of Education*, 449 F.2d 393 (5th Cir. 1971); *Monroe* v. *Board of Commissioners of City of Jackson*, 453 F.2d 259 (6th Cir.), *cert. denied*, 406 U.S. 945

The District Court's decision to award fees on this basis was clearly justified by the facts in this case. Since, moreover, the Court of Appeals reversed this award on the ground that the school board had no affirmative duty to act until brought into court, this case raises important questions regarding the responsibility of school officials to dismantle voluntarily dual school systems.

In March, 1964, the District Court in this case ordered the school board to implement a freedom of choice plan permitting black and white students to transfer to schools which had earlier been limited to pupils of the other race. Plaintiffs appealed that order, urging that the school board should be required to go beyond freedom of choice to a plan which would have actually resulted in a unitary school system. The Court of Appeals, however, affirmed the District Court's decision, 345 F.2d 310, and this Court declined to review that judgment by writ of certiorari. 382 103 (1965). The appellate proceedings, however, made it clear that the school board's legal responsibilities were not limited to implementing a freedom of choice plan. This Court directed the District Court to consider the impact of faculty segregation on the adequacy of any desegregation plans, expressly declined to approve the merits of the 1964 plan, and cautioned the defendants that delays in desegregating school systems were no longer tolerable. 382 U.S. at 105. Two of the five Fourth Circuit judges cautioned the school board that the plan should be reviewed and reappraised to see if it was working, and reminded it "that the initiative in achieving desegregation of the public schools must come from the school authorities." 345 F.2d at 322-324. On remand in 1966, the District

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(1972); *Clark* v. *Board of Education of Little Rock School Dist.*, 449 F.2d 493 (8th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); 369 F.2d 661 (8th Cir. 1966); *Kelly* v. *Guinn*, 456 F.2d 100 (9th Cir. 1972).

Court directed the implementation of a plan based on freedom of choice. 17a-24a.

Two years later, on May 27, 1968, this Court unanimously condemned freedom of choice plans which did not have the effect, in fact, of dismantling the pre-existing dual school system. *Green* v. *County School Board of New Kent County, Virginia*, 391 U.S. 430. The Court expressly rejected the argument, relied on earlier by the Fourth Circuit in approving freedom of choice in Richmond, that a school board could completely discharge its constitutional obligations by merely "adopting a plan by which every student, regardless of race, may 'freely' choose the school he will attend." 391 U.S. at 437. Those obligations required that each State eliminate "root and branch" the racial identification of its schools which had arisen under State sponsored segregation. 391 U.S. at 435, 438. *Green* stated unequivocally that school boards could not sit idly by maintaining unconstitutional school systems until and unless litigation was commenced against them. 391 U.S. at 438-439.

The message of *Green* can hardly have been missed by the respondent school board. The Fourth Circuit panel reversed in *Green* was virtually the same as that which had earlier upheld Richmond's freedom of choice plan, the relevant opinions were written by the same judge, and the 1967 decision reversed in *Green* had relied on the earlier decision in this case.[43] New Kent County itself is located less than 15 miles from the City of Richmond. Dr. Little,

[43] *Green*, reported at 382 F.2d 338, was a per curiam decision relying on a decision the same day in *Bowman* v. *County School Board of Charles City County*, 382 F.2d 326 (4th Cir. 1967). The Fourth Circuit's earlier decision approving free choice in *Bradley* was cited at 382 F.2d 327, n. 2. Judges Haynsworth, Boreman and Bryan were in the majority in both *Bradley* and *Bowman*, joined in *Bowman* by Judge Craven who had been appointed subsequent to the 1965 *Bradley* decision.

the Associate Superintendent of Schools, indicated school officials were aware actually of the inadequacy of freedom of choice prior to the motion for further relief.[44]

Despite the indisputable illegality of Richmond's freedom of choice plan under *Green*, and despite *Green's* command that school boards seize the initiative in meeting their constitutional responsibilities, the Richmond school board made no effort to change its system to comply with the law. When the school board had persisted in defiance of *Green* for almost two years, plaintiffs and their counsel were forced once again to assume the burdens of protracted litigation to gain the constitutional rights to which they were clearly entitled. Upon being brought back into court by plaintiffs in March of 1970, the board conceded, after some equivocation, the illegality of the system it had been operating for nearly two years in defiance of *Green*.[45]

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[44] In July of 1969, the school board commenced planning for the acquisition of sites for several new schools in an area to be annexed from Chesterfield County, and purchased several sites over the year that followed. In connection with questions as to how these sites were chosen, the following dialogue occurred:

> THE COURT: Dr. Little, do you recall any conversation or any suggestion that perhaps the [Richmond] freedom of choice plan would have to be changed by virtue of the United States Supreme Court decision prior to the acquisition of these sites. Did you hear anybody say anything about it or do you think the assumption was you ought to go on under the plan that you had because you felt it was a valid plan?
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> THE WITNESS: Your Honor, we have discussed it. We had some serious problems with freedom of choice, freedom of choice plan.

Hearing of June 19, 1970, 37a.

[45] On March 12, 1970, the District Court ordered the defendants to state whether they maintained the Richmond schools were being run in accordance with the Constitution. On March 19 the defendants filed a statement that they "had been advised" the school system was not a unitary one. 28a. On March 31, after the District Court inquired whether this advice had been accepted, the school board conceded that the school system was operating in a manner contrary to constitutional requirements. 317 F. Supp. 558; 30a.

The District Court based its award of legal fees in large measure on the failure of the school board for almost two years to satisfy its affirmative obligation under *Green*. In its opinion awarding these fees the District Court explained:

> It should be apparent that since 1968 at the latest the School Board was clearly in default of its constitutional duty. * * * Because the relevant legal standards were clear it is not unfair to say that the litigation was unnecessary. It achieved, however, substantial delay in the full desegregation of city schools. Courts are not meant to be the conventional means by which person's rights are afforded. The law favors settlement and voluntary compliance with the law. When parties must institute litigation to secure what is plainly due them, it is not unfair to characterize a defendant's conduct as obstinate and unreasonable and as a perversion of the purpose of adjudication, which is to settle actual disputes.
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> It is no argument to the contrary that political realities may compel school administrators to insist on integration by judicial decree and that this is the ordinary, usual means of achieving compliance with constitutional desegregation standards. If such considerations lead parties to mount defenses without hope of success, the judicial process is nonetheless imposed upon and the plaintiffs are callously put to unreasonable and unnecessary expense. 133a-134a.[46]

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[46] The District Court had taken a similar position throughout the proceedings. At the hearing of June 26, 1970, the court remarked, "We have had several years, and I will not dwell on it, but it has been several years since the New Kent case and nothing has been done. Nothing seems to be done until somebody comes in and creates litigation." 62a. On August 7, 1970, the court commented, "[T]he School Board, who has known since May 27, 1968, that freedom of choice was not constitutionally viable unless it works,

The Court of Appeals did not disturb the District Court's findings of fact regarding the school board's conduct prior to plaintiffs' 1970 motion for further relief. Nor did the Fourth Circuit question the rule applied by the District Court that legal fees should be allowed where a school board forces private citizens to resort to litigation to vindicate their clear right to a unitary school system. Rather, the appellate court excused the failure of the defendants to dismantle an admittedly illegal dual school system because (1) the school board had received no complaints from plaintiffs or others, and (2) the school board faced "vexing uncertainties in framing a new plan of desegregation." 161a-167a.

For almost two decades this Court has admonished school boards to seize the initiative in bringing their systems into compliance with the Constitution.[47] The cautious pace of

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wait[ed] for two years to come into court. After they are brought into court they stand up and admit it did not work." 79a. On February 16, 1971, the court insisted it would in the near future order into effect a new plan, despite the practical problems involved. "I have come to the conclusion that I must enter an order, preferably by April 1, and the school board just has to do the best they can. I am sorry. I don't mean to put it that way, but this matter in 1967 [sic], everybody knew what they had to do. All you had to do was read the law. Nothing was done. You can't go on and on and on." 100a.

[47] In *Brown II* the Court stated that full implementation of the constitutional principles enunciated in *Brown I* might "require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, *and solving* these problems." 349 U.S. at 299. (emphasis added) In *Cooper* v. *Aaron*, the Court explained that under *Brown II* school authorities were "duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system." 358 U.S. 1, 7 (1952). In *Green* v. *County School Board of New Kent County* the Court reaffirmed that school boards were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary school system in which racial discrimination would be eliminated root and branch. . . . [I]t was to this end that *Brown II* commanded school boards to bend their efforts . . . The burden on

"all deliberate speed" announced in *Brown* has long since given way to a call for immediate action.[48]

If the standards applied by the Fourth Circuit in excusing the school board's two year delay were accepted by this Court, there would be virtually no circumstances under which a school board would have an affirmative obligation to act. Few students or parents without the assistance and protection of counsel will bring suits against those who protest segregation. Compare *Green* v. *County School of New Kent County*, 391 U.S. 430, 440 n.5 (1968). Virtually any school district will be able to claim that, in view of the complex problems of pupil assignment, transportation, school construction and financing, it, like the Richmond school board, could not foresee the precise plan which would be approved by the courts if litigation were commenced. Compare *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). But whatever "uncertainties" existed before or after *Swann* were as to the tools which the courts could use when state officials failed to comply with the law. The tools available to school officials themselves are limited only by their imagination and practical considerations; school boards have always been free to

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a school board today is to come forward with a plan that promises realistically to work and promises realistically to work *now*." 391 U.S at 437-439 (1968); see also *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971).

[48] In 1963 and 1964 this Court announced that the context which surrounded the standard of *Brown I* had long since changed. *Goss* v. *Board of Education*, 373 U.S. 683, 689 (1963); *Calhoun* v. *Latimer*, 377 U.S. 363, 364-65 (1964). *Griffin* v. *School Board* announced "[T]he time for mere deliberate speed has run out. . . ." 377 U.S. 218, 234 (1964). Seven years ago, in this very case, the Court declared, "Delays in desegregating school systems are no longer tolerable." *Bradley* v. *School Board of Richmond*, 382 U.S. 103, 105 (1965). The command in *Green* for integration *now* has been reiterated in subsequent decisions. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 13-14 (1971).

adopt any techniques which worked, even though some might be beyond the power of the federal courts to order. Compare *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *McDaniel* v. *Barresi*, 402 U.S. 39 (1971). The goal to be achieved has always been clear—the creation of a unitary school system. Compare *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968). Any uncertainty on the part of the board as to how to achieve a unitary system cannot excuse the board's decision not to try to achieve such a system at all.

It has never been claimed, and no court has ever held, that the *actual* reason the school board took no action in the face of *Green* in 1968 was that it had no complaints or did not know what to do. The school board never asserted that it spent the 22 months after *Green* trying to formulate a new desegregation plan; once litigation commenced, the board was able to devise its first proposed plan in 41 days, and its second in 27. On the contrary, District Court found that the general attitude of the authorities was that they would take no steps to establish a unitary school system except under court order. 133a. The only excuse actually offered by the school board for failing to act after *Green* was that it was complying instead with the 1966 court order authorizing a freedom of choice plan.[49] The notion that the

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[49] Brief for Appellants, p.21. At the hearing of August 7, 1970, the following dialogue occurred between the Court and counsel for the school board.

> THE COURT: . . . [T]he School Board, who has known since May 27, 1968, that freedom of choice was not constitutionally viable unless it works, wait for two years to come into court. After they are brought into court they stand up and admit it did not work.
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> MR. MATTOX: The School Board was operating a system under the direction of this Court.
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> THE COURT: But they knew that that was no longer valid.
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> MR. MATTOX: But it was still operating, Your Honor, as—
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> THE COURT: You mean they were using the technical aspect; is that it?

school board could evade responsibility for obeying *Green* by complying instead with a lower court decision preceding and inconsistent with *Green* is completely at odds with the standards of scrupulous obedience of the law demanded of any government agency.

Moreover in the instant case the school board was in violation of the 1966 decree itself. The 1966 plan went beyond mere freedom of choice in several respects. First it required, pursuant to the order of this Court, that the board end existing racial segregation of faculty and assign faculty and other staff so that no school was identifiable as intended for students of a particular case.[50] Yet in 1970 the District Court discovered that 45 of 66 schools had faculty and staff in excess of 90% white or 90% black. 338 F. Supp. 67, 72; see also 317 F. Supp. 555, 560-561. It further found that "[u]nder the freedom of choice plan governing Richmond's schools through 1969-70, the faculties of many schools were plainly segregated. This fact, stand- and in all probability it also impaired the process of student ing alone, contributed to the racial identifiability of schools, body segregation by personnel initiative." 325 F. Supp. 828, 838. The Superintendent of Schools conceded that the board had never actually required teachers to work at a particular school in order to achieve faculty integration.[51]

MR. MATTOX: No, sir, they were following the directive of this Court.

THE COURT: In spite of the fact that they knew that that was no longer the law, Mr. Mattox, really?

MR. MATTOX: Your Honor, the law—any School Board apply this as the law under the order that was issued in this case. Whether the law had changed or not is beside the point. It was not the law in this case at that time.

79a.

[50] 20a-21a.

[51] At the hearing of June 19, 1970, Dr. Adams testified, "We have used all the means that we know how during the past four years to get teachers to move from one school to another *short of* making it a condition of employment" 49a (Emphasis added).

Second, the 1966 decree directed that school construction not be designed to perpetuate, maintain, or support racial segregation.[52] Yet in 1970 the District Court found

> "School construction policy has contributed substantially to the current segregated conditions. Schools have been built and attendance policies maintained so that, even *within* existing school divisions and by comparison with the racial ratios prevailing therein, new or expanded facilities were racially identifiable. The evidence shows that this was purposeful, its immediate and intended result was the prolongation and attempted perpetuation of segregation *within* school divisions." 338 F. Supp., 86 (emphasis added).

Most significantly, the plan provided that it must be evaluated "in terms of results," and that if the steps taken by the school board did not produce "significant results . . . the freedom of choice plan will have to be modified with consideration given to other procedures such as boundary lines in certain areas."[53] Four years later the court concluded "there was generally little change in the racial composition of the schools from the inception of the freedom of choice plan" to 1970. 317 F. Supp. 555, 561. Three of seven high schools were more than 90% black. Of nine middle schools, 3 were over 99% black and 3 were over 90% white. There were 17 all black elementary schools, and another 4 over 99% black, with 15 elementary schools over 90% white. 317 F. Supp. 555, 571-72.

In view of the fact that the defendant school board had for several years been in open and inexcusable violation of both *Green* and the 1966 court order, and had thus compelled the plaintiffs to pursue further litigation to obtain rights to which they were clearly entitled, the District

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[52] 23a.

[53] 22a-23a.

Court plainly had the discretion to award plaintiffs attorneys' fees.

2. *Conduct After the Motion for Further Relief.*

Since the defendants' obdurate refusal to afford plaintiffs their constitutional rights forced them to initiate the litigation of 1970-71, plaintiffs would have been entitled to compensation for the ensuing legal fees even if the school board's conduct, after being brought back into court, had been exemplary. After initially conceding that its freedom of choice plan was illegal and that plaintiffs were entitled to further relief, the school board proposed five desegregation plans—one in May 1970, one in July 1970, and three in January 1971. The District Court rejected both the May and July submissions as inadequate, but accepted the July plan as an interim measure so that schools could open in September. The court found two of the three January plans also deficient, and adopted the third, under which Richmond is now operating. The legal services for which the District Court awarded attorneys fees were expended largely in opposing the inadequtae school board plans of May and July,[54] and the award was grounded, *inter alia,* on the unreasonableness of the school board in proposing such "additional relief" as was manifestly inadequate.[55]

The first plan offered by the school board was one prepared by the Department of Health, Education and Welfare ("HEW") and modified only insignificantly by the board. This was a neighborhood school plan devised by simply assigning students to the school nearest them with-

[54] The District Court's award dealt only with services performed before January 29, 1971. 141a. Virtually all the services in this period were performed between the filing of the motion for further relief in March and the rejection of the second plan in August. 94a-95a.

[55] See 135a-137a.

out regard to the resulting racial composition of the schools or the extent to which the pre-existing dual school system was dismantled. The plan had at best a minimal impact on the pattern of racially identifiable schools established by the board before *Brown* and perpetuated by freedom of choice. The school board proposed that there be 20 schools with at least 90% black students, 19 schools with at least 70% white students, and only 14 schools between these two extremes.[56] After almost three months had been expended in the preparation and analysis of this plan—a crucial period since the new school year was fast approaching—and after counsel for plaintiffs had expended substantial efforts in opposing a plan which would have largely defeated their request for additional relief, the District Court rejected this plan for continued segregation of the Richmond schools as "[u]tterly ridiculous."[57]

The school board cannot escape liability for legal fees caused by the proposal on the ground that it was prepared by HEW. As the District Court pointed out and counsel for the board conceded, the responsibility for proposing an effective plan of desegregation was the board's, not HEW's.[58] While under many circumstances it may be constructive for a school board to turn to HEW for assistance in preparing such a plan, that was manifestly and foreseeably not the situation in this case. As was well known to the school board, black and white school children were not evenly distributed throughout the city, but were grouped in residentially segregated areas, and under the illegal freedom of choice plan generally attended the school nearest their home which was, in most cases, either overwhelmingly black or overwhelmingly white. At the very

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[56] Transcript of Proceeding of June 29, 1970, 59a-61a, see 317 F. Supp. 555, 564-65.

[57] Transcript of Proceeding of June 26, 1970, 57a-62a.

[58] Transcript of Proceedings of June 19, 1970, 49a.

time that the school board proposed to seek the assistance of HEW in preparing a plan of desegregation, that Department was under instructions from the administration to make the "neighborhood school" the basis of any proposed plan, and not to employ transportation of pupils "beyond normal geographic school zones." Public Papers of the Presidents: 1970, pp. 112-113 (February 16, 1970), 315 (March 24, 1970). If, as seems inconceivable, the school board was unaware of HEW's policies when it first proposed seeking its assistance, that was no longer the case after March 31, 1970 when, in conference with the District Court, plaintiffs' counsel expressed his grave reservations at this proposal in the light of the administration's position.[59]

Despite this warning, the school board persisted in asking that HEW prepare a plan. The board expressed no concern to HEW over the policies announced by the administration, and made no request that they be ignored in preparing its recommendations.[60] During the weeks that HEW was preparing its recommendations, the school board, despite ample resources, made no effort to draft any proposals of its own. Whatever illusions, if any, the board may have had as to HEW's intentions were necessarily dispelled when the HEW plan was received in early May. At that point the school board, which had early conceded to the court that it would not be bound by HEW's recommendations,[61] knew full well that the HEW plan meant a continuation of racially identifiable schools throughout the city. Had the board desired in good faith to dismantle Richmond's dual school system, it would have reported to the court the inadequacy of the HEW plan and asked for additional time to prepare a new plan of its own.

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[59] Transcript of Proceedings of March 31, 1970, 33a.

[60] Transcript of Proceedings of June 19, 1970, 45a.

[61] Transcript of Proceedings of March 31, 1970, 33a.

Such a step would have avoided the substantial delay and many unnecessary hours of plaintiffs' counsel's time necessitated by insisting on litigating the merits of a manifestly inadequate proposal. Instead the school board, without considering any alternatives,[62] approved the HEW plan and submitted it to the court.

After the board had submitted this plan to the court, and while plaintiffs were at work preparing their response, the Fourth Circuit handed down its decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 431 F.2d 138 (May 26, 1970). *Swann* held that school boards which had operated a dual system must "use all reasonable means to integrate the schools in their jurisdiction," including busing, non-contiguous zoning and clustering. 431 F.2d at 142-143. If there was ever any doubt as to the invalidity of the HEW plan, and plaintiffs insist there was not, surely those doubts were extinguished by *Swann.* Had the board, in the face of *Swann,* moved with dispatch to withdraw the HEW plan and prepare a new one, further delay would have been avoided and considerable effort by plaintiffs' counsel would have been unnecessary. Instead, the board insisted on advocating the HEW plan in the teeth of *Swann.* Despite *Swann's* command "all reasonable efforts be made to integrate every school," the school board offered one witness that a unitary school system was achieved by any assignment plan that did not consider the race of the children,[63] and a second who testified that a desegregated school in any school in which "[t]here is at least one legally definable Negro in an otherwise all-white school or there is at least one definable white in an otherwise all-Negro school . . ." [64] Despite the fact that *Swann* approved

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[62] Transcript of Proceedings of June 19, 1970, 41a.

[63] *Id.* 50a.

[64] Transcript of Proceedings of June 19, 1970, p. 173.

the decision of the district court in that case rejecting a plan for elementary school desegregation because it was based on contiguous geographical zoning and thus left large numbers of virtually all-black or all-white schools, the board's witness testified that the board's proposal was prepared subject to the same limitation.[65] Despite Swann's ruling that busing was one of the reasonable means which was to be used if necessary to achieve integration, the board's own witness further conceded that additional transportation was not considered in preparing the board's plan.[66] Despite the holding in *Swann* that further steps were to be taken if some schools remained segregated because of residential patterns, 431 F.2d at 147, the board's witness testified that the residential patterns of Richmond were not considered in the plan still supported by the board.[67] Indeed, not even the race of the children in each school under the plan had been considered.[68] Although *Swann* disapproved as ineffectual a plan for elementary schools which left about half the black students in nearby segregated schools, 431 F.2d at 146, counsel for the school board conceded its plan would leave over 50% of the black students in schools over 95% black.[69]

Whatever the board's motives may have been when it first solicited the assistance of HEW in March of 1970, the District Court's statement welcoming "help" from any source[70] did not authorize the board to delegate its entire responsibility to submit a plausible plan of desegregation

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[65] *Id.* 44a. See also pp. 122, 177.

[66] *Id.* 44a-45a. See also pp. 97, 138 *et seq.*

[67] *Id.* p. 91.

[68] *Id.* pp. 107-108.

[69] *Id.* p. 103.

[70] Transcript of Proceedings of March 31, 1970, 32a.

to any other government agency, least of all one committed to a policy of rigidly adhering to neighborhood schools even where, as in Richmond, that policy perpetuated a dual school system. The board's decision to submit the inadequate HEW plan to the court, and to stubbornly advocate that plan even after *Swann*, contributed nothing to the fashioning of appropriate relief, and served only to delay that process and to place additional burdens on plaintiffs' counsel. The award of attorneys fees for the work required of such counsel by reason of the board's conduct was well within the discretion of the District Court.

Following the rejection of the HEW plan, the school board was directed to prepare a new plan for operation of the schools in the 1970-71 school year, to be considered over the summer. Under the plan proposed by the board two of the seven city high schools remained racially identifiable, as did certain of the middle level schools.[71] Most significantly, 12 of the elementary schools were more than 90% black and seven of them more than 90% white.[72] In *Swann* the Fourth Circuit had expressly held inadequate a plan submitted to the district court in that case which left about half the white and black elementary school pupils in schools that were nearly completely segregated. 431 F.2d 138, 146. Despite this clear holding, the Richmond school board proposed two months later that 8,814 of 14,963 black elementary pupils be in schools over 90% black, and 4,621 of 10,296 white elementary students be in schools over 90% white.[73] The District Court rejected this proposal as a final plan, but adopted it as an interim measure so that the schools could open in September. 317 F. Supp. 555, 575-6.

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[71] 317 F. Supp. 555, 573.

[72] 118a.

[73] 118a.

The school board urged below that its conduct in proposing these two unacceptable plans was not unreasonable in view of the confusion that existed as to what tools might be required by law.[74] In fact, however, the Fourth Circuit had made clear in *Swann* a month before the hearing on the HEW plan that a school board "must use all possible means to integrate the schools in their jurisdiction," 431 F.2d at 138, including, *inter alia*, busing and satellite zoning. 431 F.2d 145. The school board cannot have failed to understand its duty, even before *Swann*, to eliminate racially identifiable schools, a goal neither achieved nor even approached by these plans.

The legal services performed by plaintiffs would never have been required if, as might have been hoped, the school board had proposed a constitutionally adequate plan in May of 1970, instead of January of 1971. Doubtless there were methods of obstruction to which the defendant did not resort, and at a later stage in the litigation the defendant assumed a significantly more constructive attitude, but these are factors of which the District Court was cognizant when it concluded that legal fees should be awarded in this case. At the stage of the proceedings when the legal services at issue were performed, each move by the board in the agonizingly slow process of desegregation was taken "unwillingly and under coercion." 338 F. Supp. 67, 103. The fee awarded plaintiffs' counsel was substantially less than that paid out of tax funds to counsel for the school board.[75] Under the circumstances the decision of the District Court to award attorneys' fees cannot be said to have been an abuse of discretion.

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[74] Brief for Appellants, p. 25.

[75] See Letter of Counsel for the School Board, dated March 11, 1971, 102a-104a.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be reversed.

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